

Feb 07, 2019

SEAN F. McAVOY, CLERK

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

LISA H.,

Plaintiff,

vs.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 4:18-cv-05009-MKD

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 15, 19

Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 15, 19. The parties consented to proceed before a magistrate judge. ECF No. 7. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, the Court grants Plaintiff's Motion, ECF No. 15, and denies Defendant's Motion, ECF No. 19.

JURISDICTION

The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g); 1383(c)(3).

STANDARD OF REVIEW

A district court’s review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited; the Commissioner’s decision will be disturbed “only if it is not supported by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). “Substantial evidence” means “relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to “more than a mere scintilla[,] but less than a preponderance.” *Id.* (quotation and citation omitted). In determining whether the standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one rational interpretation, [the court] must uphold the ALJ’s findings if they are supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674

1 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an
2 ALJ’s decision on account of an error that is harmless.” *Id.* An error is harmless
3 “where it is inconsequential to the [ALJ’s] ultimate nondisability determination.”
4 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ’s
5 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
6 *Sanders*, 556 U.S. 396, 409-10 (2009).

7 **FIVE-STEP EVALUATION PROCESS**

8 A claimant must satisfy two conditions to be considered “disabled” within
9 the meaning of the Social Security Act. First, the claimant must be “unable to
10 engage in any substantial gainful activity by reason of any medically determinable
11 physical or mental impairment which can be expected to result in death or which
12 has lasted or can be expected to last for a continuous period of not less than twelve
13 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s
14 impairment must be “of such severity that he is not only unable to do his previous
15 work[,] but cannot, considering his age, education, and work experience, engage in
16 any other kind of substantial gainful work which exists in the national economy.”
17 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

18 The Commissioner has established a five-step sequential analysis to
19 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
20 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). At step one, the Commissioner

1 considers the claimant's work activity. 20 C.F.R. §§ 404.1520(a)(4)(i),
2 416.920(a)(4)(i). If the claimant is engaged in "substantial gainful activity," the
3 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
4 404.1520(b), 416.920(b).

5 If the claimant is not engaged in substantial gainful activity, the analysis
6 proceeds to step two. At this step, the Commissioner considers the severity of the
7 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the
8 claimant suffers from "any impairment or combination of impairments which
9 significantly limits [his or her] physical or mental ability to do basic work
10 activities," the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c),
11 416.920(c). If the claimant's impairment does not satisfy this severity threshold,
12 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.
13 §§ 404.1520(c), 416.920(c).

14 At step three, the Commissioner compares the claimant's impairment to
15 severe impairments recognized by the Commissioner to be so severe as to preclude
16 a person from engaging in substantial gainful activity. 20 C.F.R. §§
17 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more
18 severe than one of the enumerated impairments, the Commissioner must find the
19 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

1 If the severity of the claimant's impairment does not meet or exceed the
2 severity of the enumerated impairments, the Commissioner must pause to assess
3 the claimant's "residual functional capacity." Residual functional capacity (RFC),
4 defined generally as the claimant's ability to perform physical and mental work
5 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§
6 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of the
7 analysis.

8 At step four, the Commissioner considers whether, in view of the claimant's
9 RFC, the claimant is capable of performing work that he or she has performed in
10 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).
11 If the claimant is capable of performing past relevant work, the Commissioner
12 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f).
13 If the claimant is incapable of performing such work, the analysis proceeds to step
14 five.

15 At step five, the Commissioner considers whether, in view of the claimant's
16 RFC, the claimant is capable of performing other work in the national economy.
17 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination,
18 the Commissioner must also consider vocational factors such as the claimant's age,
19 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
20 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the

1 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
2 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other
3 work, analysis concludes with a finding that the claimant is disabled and is
4 therefore entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1).

5 The claimant bears the burden of proof at steps one through four above.
6 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
7 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
8 capable of performing other work; and (2) such work “exists in significant
9 numbers in the national economy.” 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2);
10 *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

11 **ALJ’S FINDINGS**

12 On August 14, 2013, Plaintiff applied for Title II disability insurance
13 benefits and on August 15, 2013, Plaintiff also applied for Title XVI supplemental
14 security income benefits alleging a disability onset date of July 10, 2013. Tr. 240-
15 52. The applications were denied initially, Tr. 137-44, and on reconsideration, Tr.
16 149-59. Plaintiff appeared before an administrative law judge (ALJ) on August 17,
17 2016. Tr. 43-74. On September 28, 2016, the ALJ denied Plaintiff’s claims. Tr.
18 15-42.

19 At step one of the sequential evaluation process, the ALJ found Plaintiff
20 meets the insured status requirements through December 31, 2018 and has not

1 engaged in substantial gainful activity since July 10, 2013, the alleged onset date.

2 Tr. 20. At step two, the ALJ found that Plaintiff has the following severe
3 impairments: coronary artery disease with history of myocardial infarction status
4 post stent placement; peripheral vascular disease in left lower extremity status post
5 stent placement; degenerative disc disease; and obesity. Tr. 21.

6 At step three, the ALJ found Plaintiff does not have an impairment or
7 combination of impairments that meets or medically equals the severity of a listed
8 impairment. Tr. 25. The ALJ then concluded that Plaintiff has the RFC to perform
9 light work with the following limitations:

10 [Plaintiff] can stand or walk four hours in an eight-hour workday;
11 sit for six hours in an eight-hour workday; frequently climb ramps
or stairs, but never climb ladders, ropes or scaffolds; frequently
12 balance; occasionally stoop, kneel, and crouch; never crawl; avoid
concentrated exposure to cold, heat, wetness, humidity, vibration,
13 and hazards, such as moving machinery and unprotected heights;
and occasionally reach overhead with the right upper extremity.

14 Tr. 26.

15 At step four, the ALJ found Plaintiff is capable of performing past relevant
16 work as an administrative clerk and general ledger bookkeeper. Tr. 32. In the
17 alternative, at step five, the ALJ found that, considering Plaintiff's age, education,
18 work experience, RFC, and testimony from the vocational expert, there were jobs
19 that existed in significant numbers in the national economy that Plaintiff could
20 perform, such as production line solderer (light), electrical accessories assembler

1 (light), and semiconductor die loader (sedentary). Tr. 35. Therefore, the ALJ
2 concluded Plaintiff was not under a disability, as defined in the Social Security
3 Act, from July 10, 2013, through the date of the decision. Tr. 35.

4 On November 22, 2017, the Appeals Council denied review of the ALJ's
5 decision, Tr. 1-6, making the ALJ's decision the Commissioner's final decision for
6 purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).

7 ISSUES

8 Plaintiff seeks judicial review of the Commissioner's final decision denying
9 her Title II disability insurance benefits and Title XVI supplemental security
10 income benefits under the Social Security Act. Plaintiff raises the following issues
11 for review:

- 12 1. Whether the ALJ properly considered Plaintiff's impairments at step two;
- 13 2. Whether the ALJ properly evaluated the medical opinion evidence;
- 14 3. Whether the ALJ properly evaluated Plaintiff's symptom claims;
- 15 4. Whether the ALJ properly weighed the lay witness evidence;
- 16 5. Whether the ALJ properly evaluated Plaintiff's impairments at step three;
- 17 and
- 18 6. Whether the ALJ properly incorporated the opined limitations into the
19 RFC and evaluated steps four and five.

20 ECF No. 15 at 6-20.

DISCUSSION

A. Step Two

Plaintiff contends the ALJ erred by failing to identify a number of conditions as severe impairments at step two. ECF No. 15 at 13.

At step two of the sequential process, the ALJ must determine whether claimant suffers from a “severe” impairment, i.e., one that significantly limits her physical or mental ability to do basic work activities. 20 C.F.R. §§ 404.1520(c); 416.920(c). To show a severe impairment, the claimant must first prove the existence of a physical or mental impairment by providing medical evidence consisting of signs, symptoms, and laboratory findings; the claimant’s own statement of symptoms alone will not suffice. 20 C.F.R. §§ 404.1508; 416.908 (2010).¹

An impairment may be found to be not severe when “medical evidence establishes only a slight abnormality or a combination of slight abnormalities which would have no more than a minimal effect on an individual’s ability to work....” Social Security Ruling (SSR) 85-28 at *3. Similarly, an impairment is

¹ As of March 27, 2017, 20 C.F.R. § 416.908 was removed and reserved and 20 C.F.R. § 416.921 was revised. The Court applies the version that was in effect at the time of the ALJ’s decision.

1 not severe if it does not significantly limit a claimant's physical or mental ability to
2 do basic work activities; which include walking, standing, sitting, lifting, pushing,
3 pulling, reaching, carrying, or handling; seeing, hearing, and speaking;
4 understanding, carrying out and remembering simple instructions; responding
5 appropriately to supervision, coworkers and usual work situations; and dealing
6 with changes in a routine work setting. 20 C.F.R. § 416.921(a) (2010);² SSR 85-
7 28.³

8 Step two is "a de minimus screening device [used] to dispose of groundless
9 claims." *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). "Thus, applying
10 our normal standard of review to the requirements of step two, [the Court] must
11 determine whether the ALJ had substantial evidence to find that the medical
12 evidence clearly established that [Plaintiff] did not have a medically severe
13 impairment or combination of impairments." *Webb v. Barnhart*, 433 F.3d 683, 687
14 (9th Cir. 2005).

16
17 ² As of March 27, 2017, 20 C.F.R. §§ 416.921 and 416.922 were amended. The
18 Court applies the version that was in effect at the time of the ALJ's decision.

19 ³ The Supreme Court upheld the validity of the Commissioner's severity
20 regulation, as clarified in SSR 85-28, in *Bowen v. Yuckert*, 482 U.S. 137, 153-54
(1987).

At step two, the ALJ concluded that Plaintiff had the severe impairments of coronary artery disease with history of myocardial infarction status post stent placement, peripheral vascular disease in left lower extremity status post stent placement, degenerative disc disease, and obesity. Tr. 21. The ALJ also concluded Plaintiff had the following non-severe impairments: diabetes, hypertension, hyperlipidemia/dyslipidemia, hepatic steatosis, hiatal hernia, osteopenia, history of alcohol dependence, marijuana abuse, and opiate abuse, and depression and anxiety disorders. Tr. 21-25. After detailing the medical evidence pertaining to these impairments, the ALJ concluded these impairments did not more than minimally impact Plaintiff's ability to perform basic work activities. *Id.*

Plaintiff contends the ALJ should have determined the non-severe impairments were severe, as well as the following additional conditions: mild right heart strain, pulmonary emboli, bronchitis, "right shoulder fracture and pain," and "history of recurrent leg thrombosis, claudication, and ischemia." ECF No. 15 at 13. Plaintiff, who bears the burden of proving severity and harmful error, cites no specific evidence or meaningful argument in support of the claim that the ALJ erred at step two. ECF No. 15 at 13-14. Plaintiff has identified no evidence indicating that these conditions more than minimally impact her ability to perform basic work activities. A mere recitation of medical diagnoses does not demonstrate how each of the conditions impacts Plaintiff's ability to engage in basic work

activities. Thus, Plaintiff has not demonstrated that the ALJ erred. Moreover, Plaintiff's contention lacks merit. As Plaintiff was found to have four severe impairments, this case was not resolved at step two. If there was any error in the ALJ's finding at step two, it is harmless as all impairments, both severe and non-severe, were considered in the determination of Plaintiff's residual functional capacity. *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007). Plaintiff makes no showing that any of the conditions mentioned creates limitations not already accounted for in the RFC. *See Shinseki*, 556 U.S. at 409-10 (the party challenging the ALJ's decision bears the burden of showing harm). There was no error in the step two analysis.

B. Medical Opinion Evidence

Plaintiff challenges the ALJ's evaluation of the medical opinions of Jesus Marcelo, M.D., Wayne Hurley, M.D., and Soko Gusic, M.H.P. ECF No. 15 at 9-12.

There are three types of physicians: "(1) those who treat the claimant (treating physicians); (2) those who examine but do not treat the claimant (examining physicians); and (3) those who neither examine nor treat the claimant [but who review the claimant's file] (nonexamining [or reviewing] physicians)." *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (citations omitted). Generally, a treating physician's opinion carries more weight than an examining

1 physician's, and an examining physician's opinion carries more weight than a
2 reviewing physician's. *Id.* at 1202. "In addition, the regulations give more weight
3 to opinions that are explained than to those that are not, and to the opinions of
4 specialists concerning matters relating to their specialty over that of
5 nonspecialists." *Id.* (citations omitted).

6 If a treating or examining physician's opinion is uncontradicted, the ALJ
7 may reject it only by offering "clear and convincing reasons that are supported by
8 substantial evidence." *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).
9 "However, the ALJ need not accept the opinion of any physician, including a
10 treating physician, if that opinion is brief, conclusory and inadequately supported
11 by clinical findings." *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
12 (9th Cir. 2009) (internal quotation marks and brackets omitted). "If a treating or
13 examining doctor's opinion is contradicted by another doctor's opinion, an ALJ
14 may only reject it by providing specific and legitimate reasons that are supported
15 by substantial evidence." *Bayliss*, 427 F.3d at 1216 (citing *Lester v. Chater*, 81
16 F.3d 821, 830-831 (9th Cir. 1995)).

17 "Only physicians and certain other qualified specialists are considered
18 '[a]cceptable medical sources.'" *Ghanim v. Colvin*, 763 F.3d 1154, 1161 (9th Cir.
19 2014) (alteration in original); *see* 20 C.F.R. § 416.902 (Acceptable medical sources
20 are licensed physicians, licensed or certified psychologists, licensed optometrists,

1 licensed podiatrists, qualified speech-language pathologists, licensed audiologists,
2 licensed advanced practice registered nurses, and licensed physician assistants).
3 However, an ALJ is required to consider evidence from non-acceptable medical
4 sources, such as therapists. 20 C.F.R. § 416.927(f).⁴ An ALJ may reject the
5 opinion of a non-acceptable medical source by giving reasons germane to the
6 opinion. *Ghanim*, 763 F.3d at 1161.

7 *1. Dr. Marcelo*

8 Dr. Marcelo was Plaintiff's longtime primary care physician. Tr. 325
9 (indicating treatment since 2009); Tr. 1305 (noting treatment in 2010). Dr.
10 Marcelo provided three opinions in 2016. On February 19, 2016, following
11 Plaintiff's examination on the same date, Dr. Marcelo completed a one-page
12 "medical questionnaire" which consisted solely of checking a box stating that he
13 does "not believe that this patient is capable of performing any type of work on a
14 reasonably continuous, sustained basis" Tr. 818. On a separate physical
15 functional evaluation dated February 22, 2016 that was also based upon the
16 February 19, 2016 examination, Dr. Marcelo opined Plaintiff was capable of

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18 ⁴ Prior to March 27, 2017, the requirement that an ALJ consider evidence from
19 non-acceptable medical sources was located at 20 C.F.R. §§ 404.1513(d),
20 416.913(d).

1 sedentary work. Tr. 1218. On August 11, 2016, Dr. Marcelo opined Plaintiff
2 could perform sedentary work on a sustained, competitive basis, Tr. 1306, but that:
3 she would need to lie down 30 to 60 minutes during the day due to leg pain, chest
4 pain, and shortness of breath; she was likely to miss four or more days of work per
5 month; and work on a continuous basis would cause her condition to deteriorate.
6 Tr. 1305-06. The ALJ assigned little weight to these opinions. Relying on SSR
7 96-2p,⁵ Plaintiff argues that the ALJ was required to provide clear and convincing
8 reasons in order to reject Dr. Marcelo's opinions. ECF No. 20 at 3. But because
9 Dr. Marcelo's opinions were contradicted by examining physician James Opara,
10 M.D., Tr. 552-56, and state agency consultant Howard Platter, M.D., Tr. 116-18,
11 131-33, the ALJ was required to provide specific and legitimate reasons for
12 rejecting Dr. Marcelo's opinions. *Bayliss*, 427 F.3d at 1216.

13 i. August 2016 opinion

14 The ALJ assigned little weight to Marcelo's opinion that Plaintiff could
15 perform sedentary work on a sustained, competitive basis; that she would need to
16 lie down 30 to 60 minutes during the day due to leg pain, chest pain, and shortness

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18 ⁵ SSR 96-2p controlled when the ALJ issued his decision in May 2016 and
19 therefore governs this Court's review of the ALJ's decision. However, SSR 96-2p
20 was later rescinded, effective March 27, 2017. 82 Fed. Reg. 57 at 15263.

1 of breath; she was likely to miss four or more days of work per month; and work
2 on a continuous basis would cause her condition to deteriorate. Tr. 1305-06.
3 First, the ALJ noted that Plaintiff had testified at the administrative hearing that
4 “she discussed the form with him.” Tr. 29. At the hearing, the ALJ confirmed that
5 in August 2016, Plaintiff had personally given Dr. Marcello the form to fill out and
6 they had discussed the form and his opinion as to whether he thought she could
7 work. Tr. 55-56. The ALJ’s comment insinuates there was an ulterior motive or
8 improper influence behind Dr. Marcelo’s medical opinion. The ALJ failed to
9 provide any reason to believe Dr. Marcelo was persuaded to misrepresent
10 Plaintiff’s functional ability due to sympathies or patient pressure. This was not a
11 specific and legitimate reason to discount the medical opinion.

12 Next, the ALJ rejected Dr. Marcelo’s August 2016 opinion because it was
13 not explained. Tr. 29. The Social Security regulations “give more weight to
14 opinions that are explained than to those that are not.” *Holohan*, 246 F.3d at 1202.
15 “[T]he ALJ need not accept the opinion of any physician, including a treating
16 physician, if that opinion is brief, conclusory, and inadequately supported by
17 clinical findings.” *Thomas v. Barnhart*, 278 F.3d at 957. Relevant factors to
18 evaluating any medical opinion include the amount of relevant evidence that
19 supports the opinion, the quality of the explanation provided in the opinion, and the
20 consistency of the medical opinion with the record. *Lingenfelter v. Astrue*, 504

1 F.3d 1028, 1042 (9th Cir. 2007); *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007).
2 Moreover, a physician's opinion may be rejected if it is unsupported by the
3 physician's treatment notes. *See Connett v. Barnhart*, 340 F.3d 871, 875 (9th Cir.
4 2003).

5 Here, the ALJ stated "Dr. Marcelo provided no explanation to support his
6 conclusion that the claimant would miss four days per month versus any other
7 number of days, or why the claimant would miss any days at all." Tr. 29. This
8 conclusion is factually inaccurate. As Defendant acknowledges, ECF No. 19 at 6,
9 Dr. Marcelo's opinion contained narrative explanations throughout, including an
10 explanation of the reason Plaintiff would be likely to miss four days or more of
11 work per month indicating: "stress can precipitate chest pain, seizure. Walking can
12 cause leg pain due to her history of peripheral artery dis[ease] of the leg. Shortness
13 of breath due to her history of pulmonary thromb[osis]." Tr. 1306. Given the
14 explanation provided by the treating physician, the ALJ's rejection of the opinion
15 on the ground that it lacks explanation fails to meet the specific and legitimate
16 reason standard: it fails to set out an accurate "summary of the facts" and the ALJ's
17 interpretation of the "conflicting clinical evidence." *Reddick v. Chater*, 157 F.3d
18 715, 725 (9th Cir. 1998); *see also Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir.
19 2003) ("We require the ALJ to build an accurate and logical bridge from the
20 evidence to her conclusions so that we may afford the claimant meaningful review

1 of the SSA's ultimate findings.'). The ALJ failed to recognize and address Dr.
2 Marcelo's stated explanation.

3 Finally, the ALJ assigned little weight to Dr. Marcelo's August 2016
4 opinion because it was inconsistent with his opinions rendered in February 2016.
5 An ALJ may properly reject a medical opinion that gives no explanation for
6 deviating from the provider's prior medical opinion. *See Morgan v. Sullivan*, 945
7 F.2d 1079, 1081 (9th Cir. 1991). Determining that a medical opinion is
8 contradicted by the same doctor's notes, observations, and opinions is "a
9 permissible determination within the ALJ's province." *Bayliss*, 427 F.3d at 1216;
10 *Nguyen v. Chater*, 100 F.3d 1462, 1464 (9th Cir.1996) (An opinion itself may
11 provide grounds for suspicion as to legitimacy if it contains inconsistencies with
12 the doctor's own treatment notes).

13 Here, the ALJ did not explain or analyze the perceived inconsistency; the
14 decision simply states Dr. Marcelo's "opinion here is not consistent with Dr.
15 Marcelo's other opinions as discussed below." Tr. 29. However, the Court notes
16 that Dr. Marcelo's August 2016 opinion that Plaintiff would miss four or more
17 days per month due to her impairments is potentially consistent with Dr. Marcelo's
18 February 19, 2016 opinion that Plaintiff was not capable of performing any type of
19 work on a continuous basis. However, Dr. Marcelo's opinions are inconsistent in
20 that both his August and February 22, 2016 opinions also opined that Plaintiff was

1 capable of performing sedentary work on a sustained basis. Tr. 1306, Tr. 1218.
2 This is not “minor,” as Plaintiff characterizes the record. ECF No. 20 at 2. Given
3 that the Court has rejected two of the three reasons offered by the ALJ for
4 discounting Dr. Marcelo’s opinion, this reason, standing alone is insufficient.
5 Moreover, the Court further notes that the ALJ did not review Dr. Marcelo’s
6 opinions for consistency with the medical evidence, and instead adopted the 2014
7 opinion of nonexamining physician Dr. Platter and the 2013 opinion of Dr. Opara
8 rendered at a time Plaintiff’s symptoms were characterized as “quite well,” Tr. 47,
9 and prior to Plaintiff’s bypass surgery of an occluded artery in her left leg, Tr. 591-
10 92. The Court remands for reconsideration of the medical evidence.

11 ii. February 2016 Opinions

12 The ALJ also assigned little weight to both of Dr. Marcelo’s February 2016
13 opinions. Tr. 29-30. Given that this matter is being remanded for further
14 evaluation of Dr. Marcelo’s August 2016, the Court directs that the ALJ reevaluate
15 these opinions as well.

16 2. *Dr. Hurley*

17 In December 2013, Dr. Hurley, a medical consultant for the Washington
18 State Department of Social and Health Services, reviewed a portion of Plaintiff’s
19 medical record and opined she was capable of sedentary work. Tr. 704, 707. The
20 ALJ assigned little weight to Dr. Hurley’s opinion. Tr. 30. Because Dr. Hurley’s

1 opinion was contradicted by Dr. Opara, Tr. 552-56, and Dr. Platter, Tr. 116-18,
2 131-33, the ALJ was required to provide specific and legitimate reasons for
3 rejecting Dr. Hurley's opinion. *Bayliss*, 427 F.3d at 1216.

4 The ALJ assigned less weight to Dr. Hurley's opinion because "he provided
5 no explanation." Tr. 30. An ALJ may permissibly reject conclusory opinions that
6 do not contain any explanation of the bases for their conclusions. *Crane*, 76 F.3d
7 at 253. The ALJ specifically noted that Dr. Hurley "merely checked a box for
8 sedentary" and the form did not allow Dr. Hurley the ability to assess Plaintiff's
9 functional ability at a higher exertion category with less time standing or walking.
10 Tr. 30; *see* Tr. 704 (defining light level of work as including the ability to stand six
11 out of eight hours and defining the sedentary level to include the ability to walk or
12 stand "for brief periods.")). The lack of flexibility allowed by the form pertains
13 more to the form itself than to Dr. Hurley's opinion. Moreover, the quality of
14 explanation is just one factor the ALJ must consider in weighing any medical
15 opinion. Additional relevant factors to evaluating a medical opinion include the
16 amount of relevant evidence that supports the opinion and the consistency of the
17 medical opinion with the record as a whole. *Lingenfelter*, 504 F.3d at 1042; *Orn*,
18 495 F.3d at 631. An ALJ may choose to give more weight to an opinion that is
19 more consistent with the evidence in the record. 20 C.F.R. § 416.927(c)(4) ("[T]he
20 more consistent an opinion is with the record as a whole, the more weight we will

1 give to that opinion.”). Accordingly, the evaluation of Dr. Hurley’s opinion
2 depends on the proper consideration of all the medical evidence, including the
3 consistent opinions of Dr. Marcelo. Therefore, on remand, the ALJ must
4 reevaluate the medical evidence, including the opinion of Dr. Hurley, and compare
5 the opinion to the longitudinal evidence.

6 3. *Mr. Gusic*

7 On August 11, 2016, Mr. Gusic completed a mental RFC assessment
8 opining that Plaintiff was severely limited in her ability to work in coordination
9 with or proximity to others without being distracted by them and ability to
10 complete a normal workday and workweek without interruptions from
11 psychologically based symptoms and to perform at a consistent pace without an
12 unreasonable number and length of rest periods. Mr. Gusic also opined that
13 Plaintiff had marked limitations in ten other mental activities and moderate
14 limitations in nine other areas. Tr. 1308-09. He further opined Plaintiff had
15 marked difficulties in maintaining social functioning and concentration, persistence
16 and pace, and would likely be off-task over 30% of the time during a 40-hour week
17 schedule. Tr. 1310. The ALJ assigned this opinion little weight. Tr. 32.

1 As a mental health therapist, Mr. Gusic was not an “acceptable medical
2 source” and the ALJ could reject the opinion by giving reasons germane to the
3 opinion. *Ghanim*, 763 F.3d at 1161.⁶

4 The ALJ concluded that the assessment “does not provide any explanation”
5 and “merely checked boxes on a form.” Tr. 32. A medical opinion may be
6 rejected by the ALJ if it is conclusory or inadequately supported. *Bray*, 554 F.3d
7 at 1228; *Thomas*, 278 F.3d at 957. Individual medical opinions are preferred over

9 ⁶ Plaintiff refers to Mr. Gusic as “Dr. Gusic” and as a treating physician, and relies
10 on case law regarding the opinions of physicians. Plaintiff contends the record
11 “establishes” that Mr. Gusic has the credentials of medical doctor “with a mental
12 health care focus.” ECF No. 20 at 3. However, Plaintiff has not established Mr.
13 Gusic was a treating physician. Mr. Gusic’s own handwritten note on his signature
14 line found in his most recent record crosses out the word “physician” and replaces
15 it with “mental health therapist”; he attaches the credentials “MHP” (mental health
16 practitioner) to his printed name. Tr. 1311. At the administrative hearing, the ALJ
17 inquired as to why Mr. Gusic’s credentials varied in the record. Plaintiff explained
18 that she was told that Mr. Gusic was a medical doctor in another country, but there
19 were additional requirements necessary for him to complete in order to be a
20 physician in the United States. Tr. 64-65.

1 check-box reports. *See Crane*, 76 F.3d at 253; *Murray*, 722 F.2d at 501. An ALJ
2 may permissibly reject check-box reports that do not contain any explanation of
3 the bases for their conclusions. *Crane*, 76 F.3d at 253. However, if treatment
4 notes are consistent with the opinion, a conclusory opinion, such as a check-the-
5 box form, may not automatically be rejected. *See Garrison v. Colvin*, 759 F.3d
6 995, 1014 n.17 (9th Cir. 2014); *see also Trevizo v. Berryhill*, 871 F.3d 664, 667 n.4
7 (9th Cir. 2017) (“[T]here is no authority that a ‘check-the-box’ form is any less
8 reliable than any other type of form”). Mr. Gusic’s form assessment contains no
9 narrative explanation anywhere on the form, including the designated comment
10 section. Tr. 1311. The record contains one contemporaneous treatment note from
11 Mr. Gusic from an initial meeting on February 11, 2016, which does not support
12 the assessed limitations. Tr. 1128-29.⁷ In rejecting Mr. Gusic’s opinion, the ALJ
13 also relied upon the contradicting opinions of acceptable medical sources including

15 ⁷ It appears from the record that Mr. Gusic was Plaintiff’s treating mental health
16 care provider in 2016. Tr. 63-64. The frequency of treatment is unclear as the
17 only psychotherapy record from Mr. Gusic included in the administrative appears
18 to be from an initial meeting on February 11, 2016. Tr. 1128-29; *see also* Tr. 1139
19 (recommending “brief intervention treatment, psycho education and cognitive
20 behavioral therapy to manage current issue.”).

1 consultative examiner Dr. Marks and reviewing consultants Dan Donahue, Ph.D.
2 and Renee Eisenhauer, Ph.D. Tr. 30, 32. It was the ALJ's role to weigh this
3 evidence. *Morgan*, 169 F.3d at 599-600. There is substantial objective medical
4 evidence conflicting with Mr. Gusic's assessment of the Plaintiff. The ALJ
5 provided a germane reason to reject Mr. Gusic's opinion. However, because the
6 Court's remand does not preclude the further development of the record, the ALJ
7 will need to reevaluate the psychological opinion evidence based upon the
8 development of the record on remand.

9 **C. Plaintiff's Symptoms Claims**

10 Plaintiff faults the ALJ for failing to rely on reasons that were clear and
11 convincing in discrediting her subjective symptom claims. ECF No. 15 at 16-19.
12 An ALJ engages in a two-step analysis to determine whether to discount a
13 claimant's testimony regarding subjective symptoms.⁸ SSR 16-3p, 2016 WL
14 1119029, at *2. "First, the ALJ must determine whether there is objective medical
15 evidence of an underlying impairment which could reasonably be expected to
16

17 ⁸ At the time of the ALJ's decision in September 2016, the regulation that
18 governed the evaluation of symptom claims was SSR 16-3p, which superseded
19 SSR 96-7p effective March 24, 2016. SSR 16-3p; Titles II and XVI: Evaluation of
20 Symptoms in Disability Claims, 81 Fed. Reg. 15776, 15776 (Mar. 24, 2016).

1 produce the pain or other symptoms alleged.” *Molina*, 674 F.3d at 1112 (quotation
2 marks omitted). “The claimant is not required to show that her impairment could
3 reasonably be expected to cause the severity of the symptom she has alleged; she
4 need only show that it could reasonably have caused some degree of the
5 symptom.” *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

6 Second, “[i]f the claimant meets the first test and there is no evidence of
7 malingering, the ALJ can only reject the claimant’s testimony about the severity of
8 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
9 rejection.” *Ghanim*, 763 F.3d at 1163 (citations omitted). General findings are
10 insufficient; rather, the ALJ must identify what symptom claims are being
11 discounted and what evidence undermines these claims. *Id.* (quoting *Lester*, 81
12 F.3d at 834); *Thomas*, 278 F.3d at 958 (requiring the ALJ to sufficiently explain
13 why it discounted claimant’s symptom claims). “The clear and convincing
14 [evidence] standard is the most demanding required in Social Security cases.”
15 *Garrison*, 759 F.3d at 1015 (quoting *Moore v. Comm’r of Soc. Sec. Admin.*, 278
16 F.3d 920, 924 (9th Cir. 2002)).

17 Factors to be considered in evaluating the intensity, persistence, and limiting
18 effects of an individual’s symptoms include: 1) daily activities; 2) the location,
19 duration, frequency, and intensity of pain or other symptoms; 3) factors that
20 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and

1 side effects of any medication an individual takes or has taken to alleviate pain or
2 other symptoms; 5) treatment, other than medication, an individual receives or has
3 received for relief of pain or other symptoms; 6) any measures other than treatment
4 an individual uses or has used to relieve pain or other symptoms; and 7) any other
5 factors concerning an individual's functional limitations and restrictions due to
6 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R. §§
7 404.1529(c)(1)-(3), 416.929(c)(1)-(3) (2011). The ALJ is instructed to "consider
8 all of the evidence in an individual's record," "to determine how symptoms limit
9 ability to perform work-related activities." SSR 16-3p, 2016 WL 1119029, at *2.

10 The ALJ found that Plaintiff's medically determinable impairments could
11 reasonably be expected to cause the alleged symptoms, but that Plaintiff's
12 statements concerning the intensity, persistence, and limiting effects of her
13 symptoms were not entirely consistent with the evidence. Tr. 28.

14 The ALJ's evaluation of Plaintiff's symptom claims and the resulting
15 limitations relies in part on the ALJ's assessment of the medical evidence. Having
16 determined a remand is necessary to readdress the medical source opinions, any
17 reevaluation must necessarily entail a reassessment of Plaintiff's subjective
18 symptom claims. Thus, the Court need not reach this issue and on remand the ALJ
19 must also carefully reevaluate Plaintiff's symptom claims in the context of the
20 entire record. *See Hiler v. Astrue*, 687 F.3d 1208, 1212 (9th Cir. 2012) ("Because

1 we remand the case to the ALJ for the reasons stated, we decline to reach
2 [plaintiff's] alternative ground for remand.”).

3 **D. Lay Evidence**

4 Plaintiff challenges the ALJ's treatment of statements provided by Lannette
5 Dodson, Plaintiff's daughter. ECF No. 15 at 15-16.

6 An ALJ must consider the statement of lay witnesses in determining whether
7 a claimant is disabled. *Stout v. Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050, 1055
8 (9th Cir. 2006). Lay witness evidence cannot establish the existence of medically
9 determinable impairments, but lay witness evidence is “competent evidence” as to
10 “how an impairment affects [a claimant's] ability to work.” *Id.*; 20 C.F.R. §
11 416.913; *see also Dodrill v. Shalala*, 12 F.3d 915, 918-19 (9th Cir. 1993)
12 (“[F]riends and family members in a position to observe a claimant's symptoms
13 and daily activities are competent to testify as to her condition.”). If a lay witness
14 statement is rejected, the ALJ ““must give reasons that are germane to each
15 witness.”” *Nguyen*, 100 F.3d at 1467 (citing *Dodrill*, 12 F.3d at 919).

16 The ALJ considered Ms. Dodson's Third Party Function Report. Tr. 32,
17 306-13. Ms. Dodson indicated Plaintiff “is not able to get out of the house and get
18 around,” and due to fatigue and pain, she cannot sit or stand for long periods of
19 time and can only walk with five-minute rests every 10-15 minutes. Tr. 311. The
20 ALJ accorded Ms. Dodson's statement little weight. Tr. 32. If the ALJ gives

germane reasons for rejecting testimony by one witness, the ALJ need only point to those reasons when rejecting similar testimony by a different witness. *Molina*, 674 F.3d at 1114; *see Valentine v. Comm’r Soc. Sec. Admin.*, 574 F.3d 685, 694 (9th Cir. 2009) (holding that because the ALJ provided clear and convincing reasons for rejecting the claimant’s own subjective complaints, and because the lay witness’s testimony was similar to such complaints, it follows that the ALJ also gave germane reasons for rejecting the lay witness’s testimony). Here, the ALJ noted Ms. Dodson’s report was “very similar” to Plaintiff’s report. Tr. 27 (*comparing* Tr. 297-304 *with* Tr. 306-13) and rejected it in part based on the ALJ’s assessment of the medical evidence. Given the necessity of a remand to reevaluate the medical evidence and for a new determination as to Plaintiff’s symptom claims, the ALJ must also reevaluate Ms. Dodson’s statement and consider what impact, if any, it has on Plaintiff’s RFC.

E. Step Three

1. Listing 1.04A

Plaintiff faults the ALJ for failing to find Plaintiff’s condition meets Listing 1.04A, disorders of the spine. ECF No. 15 at 14

At step three, the ALJ must determine if a claimant’s impairments meet or equal a listed impairment. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii).

The Listing of Impairments “describes each of the major body systems

1 impairments [which are considered] severe enough to prevent an individual from
2 doing any gainful activity, regardless of his or her age, education or work
3 experience.” 20 C.F.R. §§ 404.1525, 416.925. To meet a listed impairment, a
4 claimant must establish that she meets each characteristic of a listed impairment
5 relevant to her claim. 20 C.F.R. §§ 404.1525(d), 416.925(d). If a claimant meets
6 the listed criteria for disability, she will be found to be disabled. 20 C.F.R. §§
7 404.1520(a)(4)(iii), 416.920(a)(4)(iii). The claimant bears the burden of
8 establishing she meets a listing. *Burch*, 400 F.3d at 683.

9 In order to meet Listing 1.04A, Plaintiff must establish her impairment
10 meets or equals the criteria of 1.04A, which relevantly include: (1) evidence of
11 nerve root compression characterized by neuro-anatomic distribution of pain; (2)
12 limitations of motion of the spine; (3) motor loss (“atrophy with associated muscle
13 weakness or muscle weakness”) accompanied by sensory or reflex loss, and (4) if
14 there is involvement of the lower back, positive straight-leg raising test (sitting and
15 supine). 20 C.F.R. pt. 404, subpt. P, app. 1, § 1.04.A. *Gnibus v. Berryhill*, No.
16 2:14-cv-1669 AC, 2017 WL 977594, at *4 (E. D. Cal. March 13, 2017) (finding
17 Listing 1.04A was met) (*citing Sullivan v. Zebley*, 493 U.S. 521, 530 (1990) (“For
18 a claimant to show that his impairment matches a listing, it must meet all of the
19 specified medical criteria. An impairment that manifests only some of those
20 criteria, no matter how severely, does not qualify.”)). Further, Plaintiff must

1 establish the impairment satisfies the 12-month durational requirement. *Id.* at *7
2 (internal citations omitted); *see also Stewart v. Colvin*, 674 F. App'x 634, 635 (9th
3 Cir. 2017) (Plaintiff failed to carry his burden of establishing that he met all of the
4 criteria for Listing 1.04A).

5 The ALJ concluded Plaintiff did not meet Listing 1.04A because the
6 “medical evidence does not document any evidence of nerve root compression.”
7 Tr. 25. Plaintiff claims the ALJ failed to consider evidence of nerve root
8 compression contained in the 2015 MRI of Plaintiff's back, and this merits a
9 remand. ECF No. 15 at 14-15. The ALJ's decision explicitly considered the 2015
10 MRI, Tr. 31, but concluded the imaging was not “not definitive” of compression.
11 Tr. 32 (citing Tr. 431, 1150). The MRI report stated there “is *likely* compression of
12 the left L4 nerve root and *possible* compression of the right L5 nerve root.” Tr.
13 1220 (emphasis added). However, Plaintiff's treating physician interpreted the
14 MRI as indicating “there is compression of the right L5 nerve root and the left L4
15 nerve root.” Tr. 1150. Defendant claims Plaintiff cannot demonstrate harmful
16 error, as Plaintiff has not challenged nor demonstrated error in the ALJ's second
17 finding that Plaintiff “has not had any exams indicative of radiculopathy” as
18 evidence of motor loss accompanied by sensory or reflex loss. *See Bower v.*
19 *Astrue*, No. C11-5128-RSM-JPD, 2011 WL 5057054, at *6 (W.D. Wash. Oct.3,
20 2011) (“[E]ven if the ... MRI showed nerve root impingement, plaintiff would still

1 not meet Listing 1.04(A) due to the lack of documentation of the other criteria of
2 the listing.”). Given the necessity of a remand for further proceedings to
3 reevaluate the medical evidence, the ALJ must also reconsider whether Plaintiff’s
4 impairment meets or equals the criteria of Listing 1.04A.

5 *2. Listings 12.04 and 12.06*

6 Plaintiff contends “[p]roper consideration of the medical evidence” warrants
7 a finding that Plaintiff meets or equals Listings 12.04 (affective disorders) and
8 12.06 (anxiety-related disorders) and a determination of disability at step three.
9 ECF No. 15 at 14. On remand, the Court directs the ALJ to reconsider whether
10 Plaintiff meets a listing at step three.

11 **F. Steps Four and Five**

12 Finally, Plaintiff contends the ALJ erred at steps four and five because the
13 ALJ relied upon an RFC and hypothetical that failed to include all of Plaintiff’s
14 limitations, including: unscheduled absences more than one day per month; off-
15 task more than 10% of the time; the need for an additional 3- minute break in the
16 both the morning and afternoon; and the need to elevate her leg. ECF No. 15 at 20.

17 Because the ALJ’s RFC determination contains error, as discussed above, it
18 cannot be relied upon in steps four and five. Therefore, upon remand, the ALJ will
19 make a new RFC determination and new determinations at steps four and five.
20

1 **G. Remedy**

2 Plaintiff urges this Court to remand for an immediate award of benefits.
3 ECF No. 15 at 20.

4 “The decision whether to remand a case for additional evidence, or simply to
5 award benefits is within the discretion of the court.” *Sprague v. Bowen*, 812 F.2d
6 1226, 1232 (9th Cir. 1987) (citing *Stone v. Heckler*, 761 F.2d 530 (9th Cir. 1985)).
7 When the Court reverses an ALJ’s decision for error, the Court “ordinarily must
8 remand to the agency for further proceedings.” *Leon v. Berryhill*, 880 F.3d 1041,
9 1045 (9th Cir. 2017); *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (“the
10 proper course, except in rare circumstances, is to remand to the agency for
11 additional investigation or explanation”); *Treichler v. Comm’r of Soc. Sec. Admin.*,
12 775 F.3d 1090, 1099 (9th Cir. 2014). However, in a number of Social Security
13 cases, the Ninth Circuit has “stated or implied that it would be an abuse of
14 discretion for a district court not to remand for an award of benefits” when three
15 conditions are met. *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir. 2014)
16 (citations omitted). Under the credit-as-true rule, where (1) the record has been
17 fully developed and further administrative proceedings would serve no useful
18 purpose; (2) the ALJ has failed to provide legally sufficient reasons for rejecting
19 evidence, whether claimant testimony or medical opinion; and (3) if the improperly
20 discredited evidence were credited as true, the ALJ would be required to find the

1 claimant disabled on remand, the Court will remand for an award of benefits.
2 *Revels v. Berryhill*, 874 F.3d 648, 668 (9th Cir. 2017). Even where the three
3 prongs have been satisfied, the Court will not remand for immediate payment of
4 benefits if “the record as a whole creates serious doubt that a claimant is, in fact,
5 disabled.” *Garrison*, 759 F.3d at 1021.

6 Here, unresolved conflicts in the record exist. It is not clear from the record
7 that the ALJ would be required to find Plaintiff disabled if all the evidence were
8 properly evaluated. Further proceedings are necessary for the ALJ to properly
9 evaluate the medical evidence, Plaintiff’s symptom claims, and the lay witness
10 statement. On remand, the ALJ is instructed to allow Plaintiff the opportunity to
11 supplement the record and render a new decision in accordance with the Court’s
12 instructions herein.

13 CONCLUSION

14 Having reviewed the record and the ALJ’s findings, this court concludes the
15 ALJ’s decision is supported by substantial evidence and free of harmful legal error.
16 Accordingly, **IT IS HEREBY ORDERED:**

- 17 1. Plaintiff’s Motion for Summary Judgment, ECF No. 15, is **GRANTED**.
- 18 2. Defendant’s Motion for Summary Judgment, ECF No. 19, is **DENIED**.
- 19 3. The Court enter **JUDGMENT** in favor of Plaintiff REVERSING and
20 REMANDING the matter to the Commissioner of Social Security for further

1 proceedings consistent with this recommendation pursuant to sentence four of 42
2 U.S.C. § 405(g).

3 The District Court Executive is directed to file this Order, provide copies to
4 counsel, and **CLOSE THE FILE.**

5 DATED February 7, 2019.

6 *s/Mary K. Dimke*
7 MARY K. DIMKE
8 UNITED STATES MAGISTRATE JUDGE
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